COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-651

COMMONWEALTH

vs.

DEBRA ALMEIDA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from an order of a Superior Court judge denying her motion for new trial in which she sought to withdraw her guilty pleas to thirteen drug possession and distribution charges. She argued that she received ineffective assistance of counsel where she was advised to plead guilty rather than to pursue a meritorious motion to suppress evidence. Discerning no abuse of discretion, we affirm.

Background. The pertinent facts, as recited by the Commonwealth in the plea colloquy and in other undisputed record materials, are as follows.

Braintree police had received reports that the defendant was selling narcotics out of her condominium unit. Based on these reports, police set up surveillance in the parking lot of the defendant's residence. During surveillance, the police

watched the defendant as she approached the passenger-side window of a vehicle, reached in with both hands and exchanged something with the driver. After the defendant drove away, an officer stopped the driver, who then admitted to purchasing cocaine from the defendant.

Other officers continued to follow the defendant and watched as she briefly met with the driver of a second vehicle. The defendant then drove back to her residence, and the officers stopped the second vehicle. The driver stated that he met with the defendant and purchased narcotics.

Police then returned to the defendant's residence to arrest her for drug distribution and to freeze the scene at the condominium pending a search warrant. After entry into the residence, the police advised the defendant of her Miranda rights, and the defendant signed a consent to search form. The police searched and found $2,319 in cash and a variety of drugs in the condominium.[1]

In September 2017, the defendant filed a motion to suppress evidence, alleging that the police unlawfully entered her

[1] Crime lab analysis revealed that there were forty-nine pills containing Oxycodone, eighty-seven pills (or pill fragments) found to contain Alprazolam, one pill and fifteen films containing Suboxone, thirteen pills containing Methadone, four pills containing Gabapentin, twenty-two plastic bags containing Fentanyl, cocaine powder in a line form discovered on the kitchen peninsula, and eight glass vials that were class E steroids.

residence without a warrant. An evidentiary hearing on the motion to suppress was scheduled for November 2017, but was not held because the defendant accepted a plea agreement. As part of the plea agreement, the Commonwealth agreed to amend two of the charges so that the defendant would not be subject to one-year mandatory minimum sentences. The defendant pleaded guilty to all thirteen charges, including the two amended charges. The defendant was sentenced to two years in the house of correction with ninety days to serve, and the balance suspended for four years with conditions. The court further allowed the defendant to return to court in three years to terminate the probation early if she complied with the conditions.

The defendant's motion to terminate her probation was allowed in December 2020. She filed her motion to withdraw her guilty plea shortly thereafter, in March 2021. The defendant did not submit an affidavit from plea counsel in support of the motion, and the court denied the motion in June 2021, without an evidentiary hearing. The defendant appeals from this denial.

Discussion. On appeal, the defendant argues that she would not have entered a guilty plea but for the ineffective assistance of her plea counsel, specifically counsel's failure to litigate the filed motion to suppress, and failure to inform her of the strength of the motion, prior to her guilty plea. In her supporting affidavit, she avers that, had she been informed

of the strength of her motion to suppress, she would not have taken the plea deal, and would have instead taken her chances at trial, despite exposure to a one-year mandatory minimum.

"A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b)." Commonwealth v. Resende, 475 Mass. 1, 12 (2016). A motion judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). Commonwealth v. Scott, 467 Mass. 336, 344 (2014). We review the denial of the motion to withdraw a guilty plea under the standard of an abuse of discretion or commission of "a significant error of law." Resende, supra at 12.

"To establish ineffective assistance of counsel, the defendant bears the burden of showing that there has been a serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer, and that counsel's poor performance likely deprived the defendant of an otherwise available, substantial ground of defence" (citations and quotations omitted). Commonwealth v. Wentworth, 482 Mass. 664, 677 (2019). See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The defendant has failed to sustain her burden under the first prong of the standard to show that plea counsel's

conduct -- both his recommendation to take the plea deal, and his alleged failure to inform the defendant of the possible merits of the motion to suppress -- sufficiently deviated from that of an ordinary fallible lawyer.

Plea counsel's decision to recommend that the defendant take the plea deal in order to acquire drug-treatment assistance and avoid a one-year mandatory minimum, rather than pursue the motion to suppress, is a tactical or strategic decision that we cannot say, in light of the circumstances, was manifestly unreasonable. A strategic or tactical decision made by an attorney is "generally shown deference" and only amounts to ineffective assistance if the decision was, "manifestly unreasonable when made." (citation and quotation omitted). Commonwealth v. Valentin, 470 Mass. 186, 190 (2014). Ineffectiveness does not "arise from counsel making the best he can out of the circumstances of the crime." Commonwealth v. Hung Tan Vo, 427 Mass. 464, 471 (1998).

Under the circumstances, we need not reach a conclusion (and we express no opinion) as to the likelihood that the defendant would have prevailed on her purported motion to suppress. Even if plea counsel had successfully litigated that motion, the defendant would still have been exposed to two of the thirteen charges, including one of the charges for possession with intent to distribute cocaine, which carried a

one-year mandatory minimum.[2] The motion to suppress concerned only the evidence acquired by police after the entry to affect the arrest, and would not preclude the introduction of evidence at trial of the observed hand-to-hand drug transactions or statements made by the other two individuals involved. These would likely have served as sufficient facts, such that a rational jury might well have found that she committed the two remaining offenses beyond a reasonable doubt, even if the buyers did not testify. See Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 178 (2009) (sufficient evidence of drug transfer where officers observed defendant and buyer meet briefly in medium to high drug activity area and immediately after found buyer with cocaine). See also Commonwealth v. Alvarado, 93 Mass. App. Ct. 469, 471 (2018) (circumstantial evidence sufficient where "pieces of evidence pointed to a drug transaction," including "the brevity of the interaction between the defendant and the vehicle's driver," "police department's awareness of recent complaints of drug activity in the area," and "the recovery of cocaine from the driver").

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[2] The defendant was originally charged in 2017 with distribution of cocaine under G. L. c. 94C, § 32A (c). See St. 1982, c. 650, § 7, as amended by St. 1988, c. 125, § 1 (adding "Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances"). The Legislature repealed this mandatory minimum sentence in 2018. See St. 2018, c. 69, § 47.

Plea counsel thus had to weigh the likelihood that the defendant would be convicted even if the motion to suppress were successful. Plea counsel instead negotiated a highly favorable plea deal for the defendant, significantly mitigating her liability. See Wentworth, 482 Mass. at 678 ("Not only was counsel able to negotiate the level of the offense, he also secured a lower agreed-upon sentence of only from three to seven years of incarceration -- a significant difference from a mandatory minimum of fifteen years"). As a result of the plea deal, the Commonwealth amended the indictment from possession with intent to distribute cocaine to distribution of a Class B substance, which allowed the defendant to escape the one-year mandatory minimum sentence she otherwise faced. Furthermore, the judge imposed a custodial sentence on only two of the eligible charges and conditioned the suspension period of the custodial sentence on the completion of a drug rehabilitation program. The remaining eleven charges resulted in only probationary sentences with the same conditions as the suspension period.

Moreover, the defendant failed to provide an affidavit from plea counsel and offered no explanation for its absence. See Commonwealth v. Goodreau, 442 Mass. 341, 354 (2004) ("When weighing the adequacy of the materials submitted in support of a motion for a new trial, the judge may take into account the

suspicious failure to provide pertinent information from an expected and available source"). Without an affidavit from plea counsel, we cannot conclude that his failure to litigate the motion to suppress was not a tactical decision or that, if tactical, it was manifestly unreasonable when made.[3] Accordingly, we find no basis to conclude that motion judge abused his discretion in finding that this approach did not fall below the standard of an ordinary, fallible lawyer, or that justice was not done.

Because plea counsel's conduct was not constitutionally ineffective, there is no merit to the defendant's argument that she is entitled to a new trial based on the strength of her motion to suppress.

Order denying motion for new trial affirmed.

By the Court (Massing, Singh & Englander, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: August 3, 2022.

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[3] The defendant's own supporting affidavit also contradicts that which she stated under oath during the plea colloquy, including that she was satisfied with the advice she received from counsel. Notably, the defendant's motion to terminate her probation also states that her rehabilitative sentence "worked," "her probation was a blessing in disguise," and she has been able to "regain ownership of her life."

[4] The panelists are listed in order of seniority.